

WHAT IS THE PRIMARY FACTOR RESPONSIBLE FOR PRODUCING CHANGES
IN POLICY ESTABLISHED BY THE SUPREME COURT?:
A STATISTICAL ANALYSIS OF THE REHNQUIST COURT

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What is the Primary Factor Responsible for Producing Changes in Policy Established by
the Supreme Court?
A Statistical Analysis of the Rehnquist Court

Scholars have traditionally cited changes in Supreme Court membership as direct predictors of changes in collective voting patterns, but newer research indicates that other factors which had been virtually dismissed in terms of their motivational effects on justices may be more significant than previously thought. These other variables include a phenomenon known as ideological drift, which refers to the gradual but substantial shifts an individual Supreme Court justice experiences as a result of a series of psychosocial factors. In addition, vote-changing can occur in response to political pressure and public opinion. This paper seeks to determine the primary factor influencing shifts in Supreme Court precedent. A random sample of 34 First Amendment cases from the Rehnquist Court (1986-2005) was examined utilizing linear regression analysis. The results show that changes in Court membership, shifts in the ideology of the Court as a whole, the length of a justice's Supreme Court tenure, the party of the president at the time a case is decided, the number of Republican-appointed justices on the Court at the time a case is decided, and the political composition of the Senate at the time a case is decided are all statistically significant predictors of variations in precedent. These findings indicate that membership, ideological, and public opinion factors are operating in conjunction to produce changes in precedent handed down by the Court. Implications for future research include the integration of existing decision-making models in order to provide the most complete picture of justices' voting behavior and the resultant changes in policy established by the Supreme Court.

PART I: INTRODUCTION

Scholars have traditionally cited changes in Supreme Court membership as direct predictors of changes in collective voting patterns, but newer research indicates that another factor which had been virtually dismissed in terms of its motivational effects on justices may be more significant than previously thought. This other cause of changes in Supreme Court voting trends refers to an individual justice who changes his vote on a particular issue when that issue re-appears before the Court. Vote-changing occurs for a variety of reasons – most notably as a consequence of a phenomenon known as ideological drift, which refers to the concept that individual justices tend to experience changes in ideology during their tenures on the bench. Vote-changing can also be a response to political pressure and public opinion.

Since the 1950s, when the Warren Court handed down some of the most liberal rulings our country has ever seen, conservative presidents have been engaged in an ongoing attempt to appoint staunch conservative justices to the Supreme Court in order to reverse prior liberal rulings. Nonetheless, this effort has proved futile until very recently, because although conservative presidents were appointing conservative justices to the High Court, these judges were, by and large, drifting to the left and crafting increasingly liberal opinions.

In 2005, however, President Bush's appointments of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court proved to realign the political ideology of the bench. During the October 2006 Term, the Roberts Court's first full term, the Court handed down more split decisions than at any point in our nation's recent judicial history. Justices divided sharply along ideological lines, with the four Court conservatives and the

four Court liberals consistently battling over now-swing Justice Anthony Kennedy's fifth vote. But Kennedy has also voted conservatively in more cases than ever before during his tenure on the Court, indicating that perhaps the effects of new justices and ideological drift are working simultaneously to produce an increasingly conservative judiciary. This study therefore seeks to examine the question of whether new members on the Court, or individual justices' changing views over time, is the primary factor in producing changes in Supreme Court policy.

PART II: BACKGROUND AND HISTORY

While the judiciary was envisioned by our Founding Fathers as “beyond comparison the weakest of the three departments of power,” the Supreme Court has adopted an increasingly prevalent role in the formulation of policy in our society.¹ Casting the debate over the moral implications of judicial activism aside, it is undoubtedly clear that, over the past hundred years, the Court has handed down a series of rulings that have had profound impacts on shaping both the lives of Americans and the country’s history. This broad array of decisions ranges from the desegregation of schools in *Brown v. Board of Education* to abortion rights in *Roe v. Wade* to capital punishment in *Furman v. Georgia*. In light of the influence the Supreme Court has on the lives of ordinary citizens, it is important to understand how this branch of the government functions.

Under Article III of the Constitution, the Court’s jurisdiction is extremely limited and is essentially confined to cases that revolve around constitutional issues and have been brought before the lower courts. This means that while an individual can never appeal on an issue of fact that has been decided by a jury – for example, one cannot merely appeal an unfavorable verdict by making the claim that the jury came to the wrong conclusion about the evidence – one can appeal on the basis of an issue of law – generally, where the judge erred and allowed, for instance, prejudicial evidence to be admitted, which caused the jury to view the evidence inaccurately. Thus, in order to appeal a case to the Supreme Court, a person must have exhausted all lower-court remedies, by having already appealed either to the highest state court (if the case is a

¹ *Federalist Paper No. 78*, 1788, The Avalon Project at Yale Law School, 2006.<http://www.yale.edu/lawweb/avalon/federal/fed78.htm>

matter of state law), or to a United States Circuit Court of Appeals (if the case involves a violation of federal law). Generally, when appealing a state case, the case first gets appealed to a state court of appeals, and then to a state supreme court – although in death penalty cases many states have enacted automatic-appellate-review statutes which allow defendants to appeal directly to state supreme courts. When appealing a federal case, the case is appealed first to the federal district court for the state in which the issue arises, and then to the United States Circuit Court of Appeals for the given jurisdiction. There are 14 circuit courts of appeals for the 50 states, which means that each Court of Appeals covers multiple states known collectively as a circuit. Each United States Supreme Court Justice is assigned to one or more particular circuits, and a Circuit’s assigned justice will rule on matters, such as motions for extensions of time to file petitions with the Supreme Court, that come from individuals appealing cases from that given Circuit.

The Court also possesses original jurisdiction, which means it may review conflicts between two states because of the obvious bias that would infect a case reviewed in one of the state courts involved in the issue. For example, when New York and New Jersey both laid claim to Ellis Island, the case was heard by the Supreme Court because it would have been virtually impossible for a court in either New York or New Jersey to decide the case impartially.²

In any situation where a case comes before the Supreme Court, the party that wishes to bring the case to the Court must petition the Supreme Court for a writ of *certiorari* which, if issued, grants the party permission to bring its case before the Court. Once the petitioner (the party bringing suit) has filed for a writ, the respondent (the party that seeks to counter the petitioner’s claims) has the opportunity, but is not required, to

² *New Jersey v. New York*. No 120 ORIG. Supreme Court of the United States. 26 May 1998 (1).

file a brief in opposition. The petitioner is then allowed to file a reply brief. These documents are submitted to the justices who discuss the case at an initial conference. Often, the justices will not reach any decision about a given case during the first conference, and the case will be discussed again at one or more subsequent conferences. However, the conferences are completely private and the justices issue no statements regarding any case that they consider, thereby enshrouding the process of granting cases in secrecy.

If at least four out of the nine justices vote to grant *certiorari*, the case enters the “merits phase.” It should be noted that the justices currently grant about one percent of the cases submitted for review. During the merits phase the petitioner must file a brief on the merits of the case. The respondent is then obligated to file a brief on the merits, to which the petitioner has the option of filing one last reply brief before the briefs are submitted to the justices and the case is scheduled for oral argument.³ One or more outside parties are free to file additional briefs on the merits of the case in support of either the petitioner or the respondent. Such a party is known as an *amicus curiae*, or “friend of the Court.”⁴

If, on the other hand, four justices do not vote to grant *certiorari*, the petitioner has 30 days to submit a petition for rehearing. If this petition is denied as well, the case is for all intents and purposes dead, and the ruling of the lower court stands. A petitioner cannot re-submit a petition for *certiorari* after the initial petition has been denied.

³ *The Rules of the Supreme Court of the United States*, Rule 25. Supreme Court of the United States (2007): 34.

⁴ *The Rules of the Supreme Court of the United States*, Rule 37. Supreme Court of the United States (2007): 51.

Once oral arguments have been heard from both the petitioner and the respondent in the case, the nine justices hold conferences to vote on the case. Unlike a criminal trial in which a unanimous verdict must be reached, the Supreme Court needs only a simple majority of the justices to vote one way in order to resolve an issue. The Court's vote has two distinct effects that include the impact on the petitioner specific to the case, as well as the broader constitutional rule established by the Court, which is often called the precedent or the holding of a case. As a result of the fact that Supreme Court justices are nominated by presidents and serve for life, there are often shifts in the ideological composition of the Court depending on who is president and how many appointments to the Court he has the opportunity to make. Thus, the Court's voting patterns as a whole – a concept referred to as collective voting – may differ on the basis of the Court's membership.⁵ Because a change in the Supreme Court's collective voting record on a given constitutional problem generally produces a new holding on the issue, differences in the Court's aggregate votes are highly significant in terms of effecting new policy.

Since the 1950s, the United States has witnessed a sort of ongoing battle over political control of the judiciary. The appointment of the either famously- or infamously-liberal, depending on one's political views, Earl Warren to the position of Chief Justice served to usher in a new era in the overturning of old precedent. After Warren's retirement, and Nixon's four "law and order" appointments, the nation waited in what was anxious anticipation for some, and fearful expectancy for others, for the Burger Court to reverse Warren's landmark rulings expanding free speech rights and governing more stringently the actions of law enforcement officials. But the Burger Court proved to

⁵ Lawrence Baum, "Membership Change and Collective Voting Change in the United States Supreme Court." *The Journal of Politics* 54 (1992): 4.

embody the conservative counter-revolution that never was. Although it did chip away at some of the Warren Court's rulings, the Burger Court's establishment of a constitutional right to privacy and its imposition of restrictions on the implementation of the death penalty served largely to further alienate conservatives. Moreover, in spite of the fact that the Burger Court's successor, the Rehnquist Court, continued to erode many of the provisions of the liberal decisions handed down by Warren, it succeeded more in its attempts to keep religion out of the public sphere and to expand rights for women and gays than in its efforts to completely overturn prior liberal jurisprudence.

President Bush has made two appointments to the current Supreme Court – Chief Justice John Roberts, a conservative who has replaced the also-conservative late Chief Justice William Rehnquist, and Justice Samuel Alito, an ultra-conservative who has replaced the moderate and often-swing vote Justice Sandra Day O'Connor. Bush's appointments have, thereby, resulted in a transformation in the Court's overall ideology from moderately conservative to conservative. In fact, many scholars actually refer to the Rehnquist Court as the O'Connor Court because of her position as the most influential voter – the member of the Court who served as the tiebreaker in such landmark cases as *Planned Parenthood v. Casey*, which upheld a woman's right to obtain an abortion: "O'Connor [was]... the justice to watch.... Rehnquist may have occupied the center seat on the bench, but O'Connor was the justice in the middle."⁶

On the abortion issue alone, the Roberts Court has already handed down a five-to-four decision in *Gonzales v. Carhart*, upholding the constitutionality of the Partial Birth Abortion Ban Act passed by Congress in 2003. The Act stipulates that women cannot

⁶Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), 20.

obtain late term abortions (referred to as “partial birth abortions” by social conservatives), and provides no exception for cases in which other, less safe medical procedures may put a woman’s health in jeopardy.⁷ When a state law with the exact same provisions was ruled on in 2000, however, during which both Rehnquist and, most importantly, swing-vote O’Connor were still on the bench, the decision came down five-to-four *against* the law, stating that the Court’s abortion jurisprudence has always provided an exception for the health of the mother.⁸ In the more recent case, Roberts voted in the same way that his predecessor Rehnquist voted, but Justice Alito’s vote tipped the Court as he voted *opposite* his own predecessor, Justice O’Connor.

These abortion cases are just one example of an issue in which changes in precedent have been exacted by the still-young Roberts Court. Overall, the October 2006 Term showed evidence of an exceedingly fractured Court, which issued a total of twenty-three split decisions. Eighteen of these split decisions broke down along ideological lines, with Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito serving as the conservative bloc and with Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer functioning as the liberal bloc. Interestingly, Justice Anthony Kennedy was in the majority in all of these five-four decisions, indicating that he has become the new swing-vote on the Supreme Court. Nonetheless, it is clear that Kennedy swings right most of the time, as is

⁷ *Gonzales v. Carhart*. No. 05-380. Supreme Court of the United States. 18 April 2007 (1).

⁸ *Stenberg v. Carhart*. No. 99-830, Supreme Court of the United States. 28 June 2000 (1).

evidenced by his twelve conservative, but only six liberal, votes in the eighteen cases that have split along typical ideological lines.⁹

Given the growing importance of the Supreme Court in American society, the tension present between the two fields of research on justices' voting behavior, and Bush's two new appointments to the Supreme Court, it is highly relevant to today's political situation, and to the future of American politics in general, to determine whether changes in Court membership or changes in the voting behavior of individual justices is the primary factor responsible for producing variation in the Court's collective voting patterns. While previous research attempts to isolate only one or two variables to prove that they have an impact on changes in Supreme Court precedent, this study endeavors to aggregate a wide array of factors to ascertain the most relevant.

The remainder of this paper seeks to provide an in-depth analysis of the issue at hand. Part III examines the theories and scholarly literature related to the Supreme Court's decision-making process and variations in precedent and presents a hypothesis on the basis of this past research. Part IV discusses the study design and the statistical measures employed to test the hypothesis. Part V presents a statistical analysis of the data, and Part VI offers conclusions as well as the implications of this study for both future research and the American judiciary.

⁹*Supreme Court of the United States October Term 2006 Overview*. Georgetown Law Center Supreme Court Institute.
http://www.law.georgetown.edu/sci/documents/GULCSupCtInstituteFinalReportOT2006_29June07.pdf

PART III: THEORY AND LITERATURE REVIEW

Given the consensus among scholars that over time, the Supreme Court's collective voting patterns on issues change, which results in differences in relevant policy established by the Court, it is important to examine which factors are most responsible for producing these changes. Theoretically, in analyzing the behavior of groups of such complex individuals as Supreme Court justices, there are thousands of possible factors that are responsible for causing changes in behavior. Nonetheless, when looking at the primary cause of change in policy crafted by the Supreme Court, two major competing schools of thought emerge. The more traditional scholarly research focuses on changes in Court membership as the main cause of changes in collective voting patterns, while a newer group of scholars has targeted changes in the justices' ideology as the most pertinent reason that collective voting trends change over time. This ideological school of thought can be subdivided into two groups of scholars: a group that views the justices' changes in philosophy as responses to varying public opinion, and another faction that believes the justices drift to one side of the political spectrum during their time on the bench which accounts for changes in voting.

Although there is also another school of thought that revolves around the change in the particular issues that come before the Court as a cause for change in Court policy, this is largely rejected as the *primary* factor that influences collective voting patterns by the scholarly community. Indeed, while virtually all interested parties recognize that changes in the issues do have some bearing on the way the Court votes on these issues, even advocates of this school of thought admit that it is unlikely that issue changes have

more of an effect on voting than the other factors mentioned. Because there is no breadth of compelling literature that cites issue changes as the chief cause of changes in collective voting patterns, and because issue changes are largely absorbed by changes in a justice's position, this perspective will not be discussed throughout the remainder of this study.

THE MEMBERSHIP PERSPECTIVE

The membership school of thought cites changes in Court membership as the most influential factor in producing changes in collective voting patterns. Because Supreme Court justices sit for life, when a justice retires or dies, the president has the opportunity to appoint a new member of the Court. The nominee must be confirmed by the Senate, which has the opportunity to engage in a kind of "litmus testing" that entails questioning the candidate about his ideology, political leanings, and how he predicts he will vote on pertinent issues. Generally speaking, a president will appoint a candidate who shares his views, and whom the president therefore thinks will rule on the issues in a manner that advances the president and the justice's shared set of beliefs. Proponents of the membership school of thought employ an attitudinal model in their research, which holds that personal beliefs are the most crucial motivating factor behind a justice's decision and, moreover, that these individual values are stable over time.¹⁰ Thus, according to the attitudinal model, because justices are appointed based on their ideas, and because these ideas change only very minimally, if at all, during their tenure on the bench, the major cause of change in the Court's collective voting record is Court turnover. Supporters of the membership school of thought cite Justice Thurgood Marshall

¹⁰ William Mishler and Reginald S. Sheehan, "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective," *The Journal of Politics* 58 (1996): 171.

and Chief Justice William Rehnquist as notable examples of justices who remained consistent in their positions during their time on the Court.¹¹

In addition, scholars belonging to this school of thought have attempted to compare Courts that have existed in immediate succession to one another in order to isolate the effects of membership changes on collective voting. In examining the Vinson, Warren, and Burger Courts, Lawrence Baum has discovered that Court turnover is a more influential factor in determining changes in voting patterns than both changes in individual justices' ideology and changes in issues that reappear before the Court.¹² Baum's results indicate that the large fluctuations in the Court's rulings on issues that occur coincide with changes in Court membership. Thus, when Chief Justice Fred Vinson was replaced by Earl Warren, for example, there was a 33 percent increase in support for civil liberties. Based on similar trends, Baum has showed that the evolution of the Court's voting patterns on civil liberties occurred at the same time that there were high rates of membership change on the Court – namely, during the Warren and Burger Courts.¹³ Similarly, Jeffrey Segal has argued that his construction of a model “which assumed that each Nixon/Ford appointment added... to the Burger Court's conservatism worked best” in predicting the outcomes of actual cases.¹⁴

In another study in which Baum controlled for changes in issues coming before the Court, the data portray a 20 percent decline in the proportion of cases in which the Court supported civil liberties claims in the year immediately following Warren's

¹¹ Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, “Ideological Drift among Supreme Court Justices: Who, When, and How Important?,” *Northwestern University Law Review* (2007): 7.

¹² *Op Cit*, Baum 1992, 3.

¹³ *Ibid*, 13.

¹⁴ Jeffrey A. Segal, “Measuring Change on the Supreme Court: Examining Alternative Models,” *American Journal of Political Science* 29 (1985): 461.

retirement. Further, over the rest of the Burger Court's tenure, which spanned 15 years and witnessed a total of five new appointments to the bench, support for civil liberties claims dropped another 13.1 percentage points.¹⁵ While these results support the notion that *who* is on the Court is the factor that produces shifts in precedent, this study, and similar research, has failed to take into account and control for the possibility that justices' ideologies may have been changing over the 15 year period.

THE IDEOLOGICAL PERSPECTIVE

The school of thought that posits that changes in Court collective voting are caused by often-substantial modifications in individual justices' positions over time – a phenomenon known as ideological drift – is perhaps the most complex as it is closely intertwined with the psychological and sociological forces that affect the justices. Although the theory holds that any given justice is likely to drift, often changes in one justice's position affect the other justices' voting behaviors as a result of the group conformity effects discussed below. It is thus important to note that ideological drift refers to changes in the positions of *one specific justice*, but is often experienced by multiple justices at the same time, which leads to a more pronounced shift in the Court's ideology as a group. Proponents of the ideological drift theory generally utilize an extralegal model, which holds that justices base their decisions on a set of personal beliefs that are subject to change. Unlike the attitudinal model, however, the extralegal model does not rely on the assumption of stability in voting.¹⁶

¹⁵ Lawrence Baum, "Measuring Policy Change in the U.S. Supreme Court," *The American Political Science Review* 82 (1988): 909.

¹⁶ Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *The American Political Science Review* 86 (1992): 325.

According to Jon D. Hanson and Adam Benforado, there are complex psychological processes at work which account for the so-called ideological drift, such as the fundamental attribution error, which holds that humans generally attribute their behavior to dispositional factors such as personality and individual beliefs. Nonetheless, situational factors unique to a given set of circumstances – which trigger unconscious psychological processes – have proven to be more influential in motivating an individual's actions.¹⁷ Thus, although nominees have specific and concrete views on certain issues, once they are actually seated on the bench, these principles are subject to change simply because serving on the High Court is so different from any of the other professions a justice may have held. As a justice, Hanson and Benforado argue, an individual is exposed to different sides of the issues that he would not have known about before he was on the bench, which leads to the evolution of his belief system. In addition, other processes such as conformity to a group's ideas can lead to a sort of standardization of the Court's views as a whole.¹⁸

Traditionally, ideological drift was known simply as the liberal or leftward drift because there was a large body of evidence that showed that justices appointed by conservative presidents would become progressively more liberal throughout their tenure on the Court.¹⁹ Classic examples of justices that are cited by scholars for exemplifying the liberal drift are several of the justices who sat on the Warren Court – including the Chief Justice himself – as well as Harry Blackmun of the Burger Court. President Dwight Eisenhower's appointees to the Warren Court, who were initially conservative, drifted quite far to the left and are in fact remembered today as some of the most liberal

¹⁷Jon D. Hanson and Adam Benforado, "The Drifters," *The Boston Review* (2007): 1-6.

¹⁸*Ibid.*, 4.

¹⁹*Ibid.*

advocates for expanding individual freedoms to have ever served on the Court. Indeed, although Earl Warren presided over such landmark decisions as *Brown v. Board of Education*, which desegregated schools in the 1950s, and *Miranda v. Arizona*, which held that all suspects in criminal cases must be read their rights, earlier in his career Warren had presided over the relocation of Japanese populations into internment camps as governor of California. Furthermore, and perhaps the most notable example of a committed conservative turned loyal liberal, is Justice Harry Blackmun, who, after dissenting in the 1972 case *Furman v. Georgia* which declared capital punishment unconstitutional, authored a statement riddled with passion and regret in 1994, claiming that he would “no longer tinker with the machinery of death.”²⁰ While the leftward drift remains prevalent, new scholarly research on the topic indicates that several justices have also become increasingly conservative during their time on the bench. Thus, though it is still much more common for members of the Court to migrate to the left, it is now evident that drift towards the right occurs as well. Scholars have pointed out, for example, that Justices Stanley Forman Reed and Felix Frankfurter both grew more conservative while they served on the bench.²¹

In any event, regardless of the direction to which justices drift, those who support the Court drift theory have used statistical methods in evaluating the ideological transformations that have occurred for various justices serving on the Court. Studies done by Lee Epstein, *et al*, have carefully analyzed the voting behavior of Supreme Court justices over time and concluded that “*virtually every justice serving since the 1930s has*

²⁰ *Op Cit.* Epstein, et al 2007, 3.

²¹ Lee Epstein, Valerie Hoekstra, Jeffry A. Segal, Harold J. Spaeth, “Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices,” *The Journal of Politics* 60 (1998): 810.

*moved to the left or the right or, in some cases, has switched directions several times.”*²²

These researchers have found that although a justice’s ideology may remain stable over his first term on the bench, most justices “fluctuate soon thereafter.”²³ Such results were obtained through the use of color-coded graphs for each justice which employ a so-called “baseline term” along the vertical axis that represents the justice’s initial position, as well as a comparison term that is located on the horizontal axis. By moving across the graph horizontally and noting the change (or lack thereof) in color, a justice’s ideological changes over time can be observed.²⁴ Thus, the literature in this school of thought shows that Court drift over time, which is the product of a series of phenomena identified by social psychologists, produces changes in collective voting patterns.

THE PUBLIC OPINION PERSPECTIVE

Much like the scholars who hold that ideological drift is the major determinant of changes in Supreme Court policy, another group of scholars utilizes the extralegal model in holding that fluctuations in public opinion cause a justice to change his opinions over time. The public opinion perspective relies largely on the notion that because “the justices do not have the institutional capacities to give their rulings full effect,” as the Court lacks enforcement power, the justices must make their decisions conform to popular opinion.²⁵ Therefore, because the Court needs its rulings to be implemented by those in office in order for the Court as a whole to be considered legitimate, it is in the justices’ best interest to hand down decisions that are at least somewhat aligned with the public’s

²² *Op Cit.* Epstein, et al 2007, 3.

²³ *Ibid.*, 1.

²⁴ *Ibid.*, 19.

²⁵ Kevin T. McGuire and James A. Stimson, “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,” *The Journal of Politics* (2004): 1019.

views.²⁶ According to Kevin T. McGuire and James A. Stimson's study that analyzed the voting behavior of justices in relation to public opinion, in a large majority of the cases where the Supreme Court reversed a lower court's ruling on a civil liberty issue, the Court's decision was consistent with public opinion. Data on cases in which the Supreme Court affirmed a lower court's decision on a civil liberty issue, however, yielded results that were statistically insignificant.²⁷ Furthermore, McGuire and Stimson established that Supreme Court decisions closely followed public opinion even when there was no turnover on the Court.²⁸

Additionally, a study by William Mishler and Ronald S. Sheehan sought to analyze the effects of public opinion on justices' voting behavior. The researchers found that many justices do in fact change their votes between cases on similar issues in accordance with fluctuations in public opinion. Additionally, the study concluded that public opinion's effect "is most pronounced for more moderate justices... [which] magnifies the impact of public opinion on the Court... since moderate justices occupy, by definition, critical positions as swing votes."²⁹ Indeed, scholars and advocates before the Supreme Court alike have consistently recognized Justice O'Connor, former swing-vote extraordinaire, as the Justice who most carefully shaped her opinions to resonate with public sentiment: "O'Connor tried to take everything into account, balancing every possible consideration against every other one..."³⁰

²⁶ *Ibid.*

²⁷ *Ibid.*, 1030.

²⁸ *Ibid.*

²⁹ *Op Cit.* Mishler and Sheehan. 197.

³⁰ Mark Tushnet, *A Court Divided: the Rehnquist Court and the Future of Constitutional Law*. (New York: W.W. Norton & Company, 2006), 54.

HYPOTHESIS

This research essentially focuses on the question of justice replacement *versus* shifts in individual justices' opinions – either as a result of psychological factors or as a consequence of adapting to public opinion trends – as the *more* important factor effecting changes in collective Court voting. Therefore, given the overwhelming evidence that most justices can be influenced to engage in vote-changing as a result of their own evolving views, it is hypothesized that ideological drift is the primary factor responsible for producing variation in collective Court voting trends.

PART IV: STUDY DESIGN

It is hypothesized that variation in individual justices' positions is the primary factor which produces changes in collective Court voting patterns. Examining changes in Court membership, ideological drift, and responses to public opinion as factors that effect changes in the Court's collective voting record lends itself to a statistical design. Multiple regression analysis was therefore used to isolate the effects of these independent variables on the dependent variable, shifts in Supreme Court policy. The results were compared in order to determine which factor is most influential in producing changes in collective voting.

SELECTION OF CASES

In choosing cases with which to study the effects of changes in membership and changes in justices' ideologies, First Amendment cases are an ideal population of cases from which to draw a sample. The First Amendment encompasses freedom of speech and freedom of religion, and First Amendment claims arise in a relatively large number of cases each term. The cases studied were taken from a twenty year time period to capture the effects of new justices on the bench as well as drifting justices. This period extended from 1986 through 2005, and thus includes the entire length of the Rehnquist Court, during which there was both turnover on the bench and justices who shifted their positions over time. This twenty year period provided excellent data for this study, because there was an abundance of jurisprudence on First Amendment issues which meant there was a large population of cases from which to draw. Further, the early and late Rehnquist Courts were composed of members with fairly opposite ideologies, so it is

reasonable to conclude that the results of the analysis of cases from these Courts will apply to Courts with similar ideologies to those examined here and to Courts that fall somewhere in between. Similarly, the Rehnquist Court was the immediate predecessor of the current Court, which therefore makes the results more generalizable to future cases and gives them more predictive validity than older cases.

The study began by generating a comprehensive list of all the cases heard during the period from 1986 to 2005. Next, the cases that did not focus on First Amendment claims were subtracted from the list, which means the remaining cases were the full body of First Amendment cases heard by the Supreme Court during the time period being studied. This case inventory served as the population of cases in this study. After the list was compiled, a random sample of twenty percent of the cases was taken, which amounted to 34 cases, and which served as the sample for the study. The statistical breakdown was thus as follows:

- $N_{\text{population}}$ = all First Amendment cases heard from 1986 through 2005 = all cases heard from 1986 through 2005 – all cases not related to First Amendment
- N_{sample} = 34 randomly selected First Amendment cases

MEASURING THE DEPENDENT VARIABLE: CHANGES IN PRECEDENT

Because there are no measurement scales to examine changes in collective voting, this study employed an original scale. Changes in collective voting were looked at as the Court's move from either a liberal or a conservative position on a First Amendment issue to the opposing ideological position. Additionally, it is important to note that when looking at whether a case resulted in a change in precedent, the established precedent on the issue that was examined was the holding in the case that immediately preceded the later case being examined. For example, if there were two similar rulings that came down

on the same issue fifty years apart, and the issue re-appeared again and over-turned the previous holding, the more recent precedent was examined. This was done to ensure that most cases that re-appeared did not weight the presence of new justices too heavily, as it was likely that re-appearing cases in which an old precedent was examined would have more new justices than re-appearing cases in which newer precedents were considered. As there were few cases that had been re-examined by the Court after long periods of time only, it was rare that cases on the same issue were heard by two completely different Courts, which eliminated the possibility that these cases would have been prevalent in the study.

For the purposes of this study, a liberal stance on a First Amendment issue was defined as one that tends to bolster individual rights, whereas a conservative opinion was classified as one that restricts personal freedoms.³¹ Utilizing such a precise definition for the decisions in the cases helped to ensure reliability as there was little room for interpretation, which means that the results can be replicated easily. The dependent variable was coded as a dummy variable according to the following design. If the case had the same outcome in terms of the Court's holding, the case was coded with a zero. An example of such an outcome is the case *United States v. Eichman*, in which the Court upheld the constitutionality of flag-burning as a form of protected speech – a principle first articulated in *Texas v. Johnson*.³²

If there was some minor change in the ruling handed down by the Court, in terms of establishing new legal principles without dramatically altering the existing precedent on the issue, the case was termed a one. This is best evidenced by the 1973 case *Miller v.*

³¹ *Op Cit*, Baum 1992, 3.

³² *United States v. Eichman*. No 89-1433. Supreme Court of the United States. 11 June 1990 (1).

California. In *Miller*, the Court upheld its ruling in *Roth v. United States* in 1957 that obscenity was not a form of protected speech under the First Amendment, but also created a stricter test for defining obscene materials.³³ Cases that had a minor degree of liberal precedent change were coded with a positive one, whereas cases that evidenced a minor degree of conservative precedent change were coded with a negative one.

If some major fundamental principles changed, the case was coded as a two. *United States v. American Library Association* serves as a prime example of a case that was assigned a two. In this case, the Court allowed Congress to withhold funding from libraries that refused to implement internet filters which restricted some speech that was protected under the First Amendment. While the Court had previously ruled that restrictions on internet content were unconstitutional, *American Library Association* ultimately only infringed on people's ability to access these sites at public libraries and not within the privacy of their own homes.³⁴ If the Court established a major new liberal principle, the case was coded with a positive two, while a case that established a key new conservative principle was coded with a negative two.

Finally, if the Court completely overturned existing precedent, which would entail *both* the establishment of new legal principles *and* a switch in the Court's ruling on the issue from either liberal to conservative or from conservative to liberal, it was coded with a three. A crucial example of a drastic change in the Supreme Court's reversal on a First Amendment issue is its 1996 decision in *Agostini v. Felton*, which overturned its decision in *Aguilar v. Felton* and held contrary to *Aguilar* that the Establishment Clause is not

³³ *Miller v. California*. No.70-73. Supreme Court of the United States. 21 June 1973 (1).

³⁴ *United States v. American Library Association*. No. 02-361. Supreme Court of the United States. 23 June 2003 (1).

violated when public school teachers teach in parochial schools.³⁵ If a precedent was overturned to establish a new liberal holding, the case was coded with a positive three. Conversely, if the precedent was overturned to establish a new conservative holding, the case was coded with a negative three.

MEASURING CHANGES IN COURT MEMBERSHIP

Changes in Court membership were measured by looking at the total number of new justices sitting on the Court in the second case of each case pair. Therefore, if there were three new justices on the bench when the Court re-examined an issue, the change in membership was entered as three.

MEASURING CHANGES IN IDEOLOGY

Justices' votes in each case were entered as liberal (one), mixed (zero), or conservative (negative one). Changes in ideology were measured by coding each justice's vote as either a change in his vote from the previous case (one) or no change in his vote from the previous case (zero). If the justices had no vote in the prior case, no value was added. Similarly, because drifting justices often influence one another, the number of justices changing their opinions in each case was entered into the regression.

In addition, it was important to control for factors that are themselves likely to influence any given justice's propensity to drift. This study had to account for the passage of time over each justice's Supreme Court career because the ideological drift theory dictates that changes in justices' opinions occur gradually over time. To that end, it was important to control for the length of a justice's tenure. The number of years a justice had

³⁵ *Agostini v. Felton*. No. 96-552. Supreme Court of the United States. 23 June 1997 (1).

been on the Court during each case was included in the regression model to account for a justice's tenure on the bench. Likewise, it was also important to look at the justice's age at the time of each case because the ideological drift theory holds that Supreme Court justices often drift more with age. Thus, for each case in a case pair, the justice's age at the time of the case was inserted into the regression.

Research also indicates that a justice's degree of judicial experience before serving on the Supreme Court may influence the stability of his positions. Thus, the number of years, if any, that the justice was a judge prior to his role on the Supreme Court was another variable that was included in the regression. Likewise, studies show that appellate experience may make a justice less likely to drift because he has already been exposed to some of the issues that come before the Supreme Court. The number of years, if any, a justice spent as an appellate judge before serving on the Supreme Court was therefore a factor in the regression as well.

Although there is no body of literature that indicates that a justice's gender may affect his or her propensity to drift, it is plausible that gender may have some impact on judicial decision-making. Therefore, a dummy gender variable was included as well. A justice was coded with a zero for male and a one for female.

MEASURING RESPONSES TO PUBLIC OPINION

The major indications of political climate are the party of the president, the ratio of Republicans to Democrats in the Congress, the political composition of the Supreme Court, and a justice's confirmation vote. The party of the president at the time of the second case was coded as either Republican (zero), or Democrat (one). Similarly, although the president who appointed the justice may not have been in office at the time

the justice voted on all of the cases, research shows that justices may feel pressured to remain loyal to the presidents who appointed them. The appointing president's party was therefore included in the regression as well, as either Republican (zero), or Democrat (one).

Because the composition of the House of Representatives changes every two years as a result of Congressional elections, the make-up of the House of Representatives in particular effectively captures shifts in popular opinion. Senators, too, are democratically elected (though less often), so changes in the ideological composition of the Senate reflect changes in public opinion. To that end, the percentages of Republicans in both the House of Representatives and the Senate at the time of each case were included in the regression.

Additionally, while Supreme Court justices sit for life and their political leanings may therefore represent the ideology of the time in which they were appointed, rather than the popular opinion at the time of the case they are ruling on, the overall political climate of the Court may be a factor influencing justices' decisions. Consequently, the number of justices appointed by Republicans at the time of each case was entered into the regression.

A justice's confirmation vote is also noteworthy because it reflects the Senate's views on the justice. If the justice's views are out of line with public opinion, either he may not be confirmed, or the Senate's vote may be highly fractured. There is no better example of a splintered Senate vote than the vote at Clarence Thomas' confirmation hearings. After a politically-charged scandal, Thomas was barely confirmed by 52 percent of the Senate. Today, Thomas remains the most contentious member on the

Supreme Court. This indicates that when a candidate for the Supreme Court does not conform his views to public opinion before his confirmation hearings, he is equally – if not less – likely to align himself with popular sentiment once he has assumed his seat on the high Court's bench.

Variables

VARIABLE	DESCRIPTION	MEASUREMENT
Precedent Change	Degree of precedent change in the second case in a case pair	Binary: -3 (complete overturn to conservative holding), -2 (substantial new conservative legal principles espoused), -1 (slight conservative shift in precedent), 0 (no change), 1 (slight liberal shift in precedent), 2 (substantial new liberal legal principles espoused), 3 (complete overturn to liberal holding)
Membership Differences	Number of new justices on the Court at the time the second case in a case pair was heard	Numerical
Judicial Experience	Number of years a justice has served on any non-appellate court prior to Supreme Court appointment	Numerical
Appellate Experience	Number of years a justice has served on any appellate court prior to Supreme Court appointment	Numerical
Total Court Change in Ideology	Total number of justices changing their opinions in the second case in a case pair	Numerical
Individual Justice Change in Ideology	Individual-level analysis of whether a justice changed his opinion in the second case in a case pair	Binary: 0 (no) or 1 (yes)
Supreme Court Tenure	Number of years a justice has served on the Supreme Court at the time the second case in a case pair was heard	Numerical
Current President	Political party of the president at the time the second case in the case pair was heard	Binary: 0 (Republican) or 1 (Democrat)
Appointing President	Political party of the president that appointed a justice	Binary: 0 (Republican) or 1 (Democrat)
Confirmation Vote	Percentage of the Senate that voted in favor of confirming a justice	Numerical
Number of Republicans on the Court	Number of Republican justices on the Court at the time the second case in a case pair was heard	Numerical
Percentage of Republicans in House of Representatives	Percentage of Republicans in the House of Representatives at the time the second case in a case pair was heard	Numerical
Percentage of Republicans in Senate	Percentage of Republicans in the Senate at the time the second case in a case pair was heard	Numerical
Gender	Individual justice's gender	Binary: 0 (male) or 1 (female)

Figure 1: Description of variables and their units of measurement

PART V: ANALYSIS OF THE DATA

DISTRIBUTION OF THE DATA: THE DEPENDENT VARIABLE

The data being analyzed in this study consists of the random sample of 34 First Amendment cases. Interestingly, in four out of the five cases in which the Court voted to overturn precedent (coded as negative threes or threes), it handed down conservative rulings. Nonetheless, the majority (47 percent) of the cases were coded as ones, indicating that the Court chose to slightly expand First Amendment rights in the bulk of the cases examined in this study. This distribution is hardly surprising, as the Court more often than not prefers to chip away at previous rulings rather than to outright overturn precedent.

Precedent Change				
	Frequency	Percent	Valid Percent	Cumulative Percent
-3.00	4	11.8	11.8	11.8
-2.00	4	11.8	11.8	23.5
-1.00	3	8.8	8.8	32.4
.00	3	8.8	8.8	41.2
1.00	16	47.1	47.1	88.2
2.00	3	8.8	8.8	97.1
3.00	1	2.9	2.9	100.0
Total	34	100.0	100.0	

Figure 2: Frequency Table Showing the Degree of Precedent Change

DISTRIBUTION OF THE DATA: THE MEMBERSHIP VARIABLES

As discussed previously, the membership perspective cites changes in justices on the Court as the primary factor influencing shifts in policy established by the Supreme Court. In terms of changes in membership, about 20 percent of the cases showed no change in membership. There were very few cases in which there were more than five

new justices on the bench. Indeed, over 75 percent of the cases had between zero and five new justices on the Court.

New Justices on the Court Between Cases				
New Justices	Frequency	Percent	Valid Percent	Cumulative Percent
0	7	20.6	20.6	20.6
1	2	5.9	5.9	26.5
2	5	14.7	14.7	41.2
3	4	11.8	11.8	52.9
4	3	8.8	8.8	61.8
5	5	14.7	14.7	76.5
6	2	5.9	5.9	82.4
7	2	5.9	5.9	88.2
8	2	5.9	5.9	94.1
9	2	5.9	5.9	100.0
Total	34	100.0	100.0	

Figure 3: Frequency Table Showing the Distribution of New Justices on the Court Between Cases

DISTRIBUTION OF THE DATA: THE IDEOLOGY VARIABLES

There were a total of 302 votes cast in the 34 cases. Liberal votes constituted 51% of these votes, indicating that in spite of the fact that most justices were appointed by conservative presidents, they were willing to hand down rulings that expanded freedoms of speech and religion. On the other hand, about 37 percent of the votes cast were conservative, which shows that the conservative justices were not willing to abandon their roots entirely. The remainder of the votes were mixed and yielded some protection for, and some erosion of, First Amendment rights.

Vote in Case				
	Frequency	Percent	Valid Percent	Cumulative Percent
-1	113	37.4	37.4	37.4
0	35	11.6	11.6	49.0
1	154	51.0	51.0	100.0
Total	302	100.0	100.0	

Figure 4: Frequency Table Showing the Distribution of Votes in All Cases

Of the 302 votes 45 percent of them reflected no change in the justice's position between cases. Nonetheless, approximately 18 percent of the votes reflected some change in position, indicating that justices' opinions are by no means completely stable over time. The missing observations represent those cases in which justices had no prior vote.

Individual Ideological Change				
Case Votes	Frequency	Percent	Valid Percent	Cumulative Percent
0	136	45.0	72.0	72.0
1	53	17.5	28.0	100.0
Total	189	62.6	100.0	
Missing System	113	37.4		
Total	302	100.0		

Figure 5: Frequency Table Showing the Distribution of Changes in Individual Justices' Ideologies

In the 34 cases examined, cases in which no justices changed their positions constituted about 35 percent of the sample. In general, vote changes occurred most often for one or two members during the same case, comprising roughly 44% percent of the total changes for multiple justices.

Change in Ideology – Court				
Ideology Change	Frequency	Percent	Valid Percent	Cumulative Percent
0	12	35.3	35.3	35.3
1	10	29.4	29.4	64.7
2	5	14.7	14.7	79.4
3	4	11.8	11.8	91.2
4	3	8.8	8.8	100.0
Total	34	100.0	100.0	

Figure 6: Frequency Table Showing the Distribution of Changes in Multiple Justices' Ideologies

The distribution of justices' tenures on the Supreme Court at the time of each case was widely spread from zero to 33 years. The majority of cases, however, were voted on by justices who had served between five and 20 years on the Court. According to the ideological drift theory, this range serves as more than enough time for the justices to have begun to drift.

Justices' Tenures				
Supreme Court Tenure	Frequency	Percent	Valid Percent	Cumulative Percent
0	6	2.0	2.0	2.0
1	14	4.6	4.6	6.6
2	11	3.6	3.6	10.3
3	8	2.6	2.6	12.9
4	6	2.0	2.0	14.9
5	12	4.0	4.0	18.9
6	13	4.3	4.3	23.2
7	13	4.3	4.3	27.5
8	13	4.3	4.3	31.8
9	10	3.3	3.3	35.1
10	12	4.0	4.0	39.1
11	15	5.0	5.0	44.0
12	12	4.0	4.0	48.0
13	10	3.3	3.3	51.3
14	17	5.6	5.6	57.0
15	10	3.3	3.3	60.3
16	9	3.0	3.0	63.2
17	9	3.0	3.0	66.2
18	10	3.3	3.3	69.5
19	11	3.6	3.6	73.2
20	10	3.3	3.3	76.5
21	7	2.3	2.3	78.8
22	7	2.3	2.3	81.1
23	6	2.0	2.0	83.1
24	10	3.3	3.3	86.4
25	3	1.0	1.0	87.4
26	7	2.3	2.3	89.7
27	1	.3	.3	90.1
28	10	3.3	3.3	93.4
29	5	1.7	1.7	95.0
30	4	1.3	1.3	96.4
31	6	2.0	2.0	98.3
32	4	1.3	1.3	99.7
33	1	.3	.3	100.0
Total	302	100.0	100.0	

Figure 7: Frequency Table Showing the Distribution of Justices' Supreme Court Tenures During Each Case

The distribution of justices' ages was also wide, ranging from 44 to 85. The majority of votes (56.9 percent) were cast by justices between the ages of 56 and 71. While justices who were 56 may have been at the beginning of their Supreme Court careers, justices in the upper bounds of that range may have been on the bench for a substantial period of time, increasing the likelihood that they had begun to drift.

Justices' Ages

Age	Frequency	Percent	Valid Percent	Cumulative Percent
44	3	1.0	1.0	1.0
46	3	1.0	1.0	2.0
47	2	.7	.7	2.6
48	3	1.0	1.0	3.6
51	8	2.6	2.6	6.3
52	7	2.3	2.3	8.6
53	8	2.6	2.6	11.3
54	5	1.7	1.7	12.9
55	6	2.0	2.0	14.9
56	11	3.6	3.6	18.5
57	10	3.3	3.3	21.9
58	10	3.3	3.3	25.2
59	8	2.6	2.6	27.8
60	7	2.3	2.3	30.1
61	12	4.0	4.0	34.1
62	11	3.6	3.6	37.7
63	14	4.6	4.6	42.4
64	13	4.3	4.3	46.7
65	14	4.6	4.6	51.3
66	9	3.0	3.0	54.3
67	11	3.6	3.6	57.9
68	14	4.6	4.6	62.6
69	8	2.6	2.6	65.2
70	11	3.6	3.6	68.9
71	10	3.3	3.3	72.2
72	7	2.3	2.3	74.5
73	4	1.3	1.3	75.8
74	5	1.7	1.7	77.5
75	7	2.3	2.3	79.8
76	6	2.0	2.0	81.8
77	5	1.7	1.7	83.4
78	5	1.7	1.7	85.1
79	13	4.3	4.3	89.4
80	11	3.6	3.6	93.0
81	3	1.0	1.0	94.0
82	10	3.3	3.3	97.4
83	1	.3	.3	97.7
84	6	2.0	2.0	99.7
85	1	.3	.3	100.0
Total	302	100.0	100.0	

Figure 8: Frequency Table Showing the Distribution of Justices' Ages During Each Case

Judicial experience prior to serving on the Supreme Court ranged from zero to 14 years for the 13 justices studied. The distribution of years of judicial experience was fairly even.

Prior Judicial Experience

	Frequency	Percent	Valid Percent	Cumulative Percent
0	2	15.4	15.4	15.4
1	1	7.7	7.7	23.1
4	1	7.7	7.7	30.8
5	2	15.4	15.4	46.2
6	1	7.7	7.7	53.8
7	1	7.7	7.7	61.5
11	1	7.7	7.7	69.2
12	1	7.7	7.7	76.9
13	2	15.4	15.4	92.3
14	1	7.7	7.7	100.0
Total	13	100.0	100.0	

Figure 9: Frequency Table Showing the Distribution of Prior Judicial Experience

Like judicial experience, appellate experience ranged from zero to 14 years.

Almost 31 percent of the justices who voted in the cases in the sample had no appellate experience before serving on the Supreme Court. Appellate experience in particular is viewed as a crucial factor for exposing justices to policy issues that arise before the Supreme Court, and a lack of experience may have contributed to drifting among these justices.

Prior Appellate Experience				
Appellate Experience	Frequency	Percent	Valid Percent	Cumulative Percent
0	4	30.8	30.8	30.8
1	1	7.7	7.7	38.5
4	1	7.7	7.7	46.2
5	2	15.4	15.4	61.5
6	1	7.7	7.7	69.2
11	1	7.7	7.7	76.9
13	2	15.4	15.4	92.3
14	1	7.7	7.7	100.0
Total	13	100.0	100.0	

Figure 10: Frequency Table Showing Distribution of Years of Prior Appellate Experience

In terms of gender, since there have only ever been two women who have served on the Supreme Court, the overwhelming majority of votes cast were by male justices.

Men's votes constituted almost 81 percent of the total votes, whereas women's votes made up a mere 18 percent of the vote total.

Gender				
	Frequency	Percent	Valid Percent	Cumulative Percent
0	247	81.8	81.8	81.8
1	55	18.2	18.2	100.0
Total	302	100.0	100.0	

Figure 11: Frequency Table Showing Distribution of Justices' Votes By Gender

DISTRIBUTION OF THE DATA: THE PUBLIC OPINION VARIABLES

The distribution of the presidents' parties during each of the cases indicates that the presidency was held by Republicans for most of the time period studied. Republican presidents were in power during almost two-thirds of the cases, which means that public opinion likely trended towards conservatism over these 20 years.

Presidents' Parties During Each Case				
Current Presidents' Parties	Frequency	Percent	Valid Percent	Cumulative Percent
0	22	64.7	64.7	64.7
1	12	35.3	35.3	100.0
Total	34	100.0	100.0	

Figure 12: Frequency Table Showing Distribution of Presidents' Parties During Each Case

Furthermore, the justices voting in the sample of cases were almost all appointed by Republican presidents. Nine, or roughly 70 percent, of the 13 justices studied here were nominated by conservative presidents. According to the public opinion perspective, this means that at least some of these justices should have voted conservatively in a majority of cases with previously liberal precedents, in order to remain loyal to their appointing president.

Appointing Presidents' Parties

Appointing Presidents' Parties	Frequency	Percent	Valid Percent	Cumulative Percent
0	9	69.2	69.2	69.2
1	4	30.8	30.8	100.0
Total	13	100.0	100.0	

Figure 13: Frequency Table Showing Distribution of Appointing Presidents' Parties

In examining the proportion of the House of Representatives that was Republican during each case, the distribution ranges from 38 to 54 percent. Fewer cases were decided when there was a minority of Republican Congressmen (13 cases, or 38.2 percent) than when Republicans controlled the House (21 cases, or 61.8 percent). The theory that public opinion is the most important factor contributing to changes in Supreme Court policy dictates that the majority of case outcomes should have chipped away at liberal precedents in favor of more conservative rulings.

Republican Percentage of the House of Representatives During Each Case

Republicans in House	Frequency	Percent	Valid Percent	Cumulative Percent
38%	2	5.9	5.9	5.9
40%	5	14.7	14.7	20.6
41%	5	14.7	14.7	35.3
42%	1	2.9	2.9	38.2
51%	7	20.6	20.6	58.8
52%	3	8.8	8.8	67.6
53%	10	29.4	29.4	97.1
54%	1	2.9	2.9	100.0
Total	34	100.0	100.0	

Figure 14: Frequency Table Showing the Distribution of Republican Percentages of the House of Representatives During Each Case

Similarly, the percentage of Republicans in the Senate during each case constituted a majority in 18, or 52.9 percent, of the cases. Again, scholars from the public opinion school of thought would predict conservative case outcomes during the years in which Republicans dominated the Senate.

Republican Percentage of the Senate

	Frequency	Percent	Valid Percent	Cumulative Percent
43%	2	5.9	5.9	5.9
44%	2	5.9	5.9	11.8
45%	8	23.5	23.5	35.3
50%	3	8.8	8.8	44.1
51%	3	8.8	8.8	52.9
52%	4	11.8	11.8	64.7
53%	2	5.9	5.9	70.6
55%	10	29.4	29.4	100.0
Total	34	100.0	100.0	

Figure 15: Frequency Table Showing the Distribution of Republican Percentages of the Senate

The makeup of the Court was overwhelmingly conservative between 1986 and 2005. There were seven Republican appointees during 85 percent of the cases and there were never fewer than six Republican appointees during the entire 20 year period covered by the study. This should translate into a conservative political climate on the Court and, therefore, into increasingly conservative decisions.

Number of Republicans on the Court During Each Case

Court Republicans	Frequency	Percent	Valid Percent	Cumulative Percent
6	2	5.9	5.9	5.9
7	29	85.3	85.3	91.2
8	3	8.8	8.8	100.0
Total	34	100.0	100.0	

Figure 16: Frequency Table Showing the Distribution of the Number of Republicans on the Court During Each Case

Justices' confirmation votes served as the final measure of public opinion. Although not all confirmation votes were available because confirmation hearings used to employ voice votes which were not recorded, it is clear that a large proportion (45 percent) of the justices in this study were confirmed unanimously. In fact, there were only two justices in the study who received less than 75 percent of the support of the Senate. These results indicate that most of the justices studied here were approved by a wide

margin and were therefore deemed by the Senate to hold viewpoints that coincided with popular opinion.

Justices' Confirmation Votes				
Confirmation Votes	Frequency	Percent	Valid Percent	Cumulative Percent
52%	1	6.7	8.3	8.3
72%	1	6.7	8.3	16.7
86%	1	6.7	8.3	25.0
91%	2	13.3	16.7	41.7
97%	1	6.7	8.3	50.0
100%	5	45.0	50.0	100.0
Total	11	80.0	100.0	
Missing System	3	20.0		
Total	14	100.0		

Figure 17: Frequency Table Showing the Distribution of Justices' Confirmation Votes

MULTIPLE LINEAR REGRESSION ANALYSIS

Before running the regressions, it was necessary to make sure that there were no problematic correlations between any of the independent variables. To that end, a Pearson Correlation Test was conducted. The results of the test indicate that the Republican percentages of the House of Representatives and the Senate were in fact correlated. Thus, it was necessary to drop one of these variables in order to avoid biasing the regression. The variable measuring the Republican percentage of the House of Representatives was dropped because, given the relative sizes of the House and the Senate, each individual Senator clearly exerts more influence on shaping public policy.

Table of Correlations

	Member Differences	Judicial Experience	Appellate Experience	Total Court Change in Ideology	Individual Justice Change in Ideology	Supreme Court Tenure	Current President	Appointing President	Confirmation Vote	Number of Republicans on the Court	Percentage of Republicans in House of Representatives	Percentage of Republicans in Senate
Judicial Experience	.041											
Appellate Experience	.020	.780										
Total Court Change in Ideology	-.420	.046	.017									
Individual Justice Change in Ideology	-.506	-.311	-.198	.267								
Supreme Court Tenure	-.074	-.494	-0.370	-.052	.420							
Current President	.201	.070	.023	-.083	-.107	-.142						
Appointing President	-0.005	.314	.419	.033	-.133	-0.083	-.033					
Confirmation Vote	-0.031	.466	.459	-.019	.080	-0.017	-.066	.119				
Number of Republicans on the Court	.081	-.004	-.047	-.148	-.095	-0.010	.255	-.080	-.037			
Percentage of Republicans in House of Representatives	.145	.166	.116	.098	-.074	.022	.310	.006	-0.134	-.172		
Percentage of Republicans in Senate	.180	.193	.104	.044	-0.061	.018	.329	.017	-0.113	-.223	.880*	
Gender	.022	.130	.227	.018	-.033	-.148	.031	.185	.268	-.029	.108	.119

Figure 18: Table of Correlations

Note: * indicates that the variables exhibit some multicollinearity and may bias the regression.

In the first regression, the dependent variable change in precedent was regressed on only the independent variables that measure changes in membership and ideology. The independent variables that measure public opinion were not included in this regression. In order to be considered statistically significant for the purposes of this study, a variable must have a t-value of -2.0 or less, or 2.0 or greater. Thus, the results of this regression indicate that, for the random sample of First Amendment cases, the only variables that meet the requirement for statistical significance are membership differences and the total number of justices changing their positions.

The results of the regression indicate a coefficient of -.10 for membership change. The statistical interpretation of this coefficient signifies that change in membership and change in precedent are negatively correlated. Therefore, the more new justices there are on the bench, the more likely it is that existing precedent becomes conservative. Additionally, the value of -.10 means that each one-unit increase in membership change decreases the dependent variable by .10 units. Because the dependent variable is change in precedent, which was coded by the numbers zero through three to reflect the different degrees to which the Supreme Court could shift precedent, every new justice on the bench will make precedent more conservative by a value of .10. For example, one new justice might decrease the dependent variable from 0 to -.10.

In addition, the variable that measured the total number of justices who changed their ideologies is also significant. The regression yielded a coefficient of -.24 for this variable, which means that each one-unit increase in ideology change decreases the dependent variable by .24 units. Therefore, each additional justice changing his opinion in any given case increases the conservativeness of the precedent by .24.

Moreover, it is important to examine the R^2 value, which indicates the degree to which the variation in the dependent variable is explained by the independent variables. R^2 always falls between zero and one, where zero means that none of the variation in the dependent variable is explained by variation in the independent variables, and where one means that all of the variation in the dependent variable is explained by variation in the independent variables. The value of R^2 in this regression is .04, which is relatively low and means that little of the variation in precedent can be attributed to changes in both Court membership and justices' ideologies. This may be a consequence of the fact that the regression here excludes the effects of public opinion.

The next regression contains only the variables measuring public opinion and the dependent variable. In this regression, the variables that are statistically significant are the president's party at the time of the case, the number of Republicans on the Court, and the percentage of the Senate that was Republican at the time of the case.

The coefficient for the president's party during the case is -.54, which portrays an inverse relationship between the party of the president and the likelihood that precedent will shift in the liberal direction. In this study, the president's party was assigned a value of zero, meaning Republican, or one, meaning Democrat. Therefore, the regression shows that when there is a one unit increase in the party of the president, meaning a change from a Republican to a Democrat, precedent becomes more conservative by .54 units.

In terms of the Republican composition of the Court, the coefficient is 1.20, meaning that each additional Republican justice on the Court actually makes Supreme Court policy more liberal by 1.20 units. This is an interesting finding, because it means that despite the fact that these justices are conservative, they are actually liberalizing

Court precedents. Essentially, it reaffirms the fact that despite Republican appointments, conservative justices never managed to quite reverse prior liberal rulings, and instead expanded First Amendment rights.

Additionally, there is a positive relationship between the percentage of Republicans in the Senate and the probability that Supreme Court policy will shift and become more liberal. The coefficient for this variable is .10, which is a rather odd finding as it means that that each additional percentage point of Republicans in the Senate increases the degree of liberalism in Supreme Court policy by .10 units.

In this regression, the value of R^2 is .08, which means that there are many other variables that explain variations in Supreme Court policy. This is understandable, as the only variables included in this regression are those that measure changes in public opinion.

The next regression that was conducted regressed the dependent variable precedent change on all of the variables in the study. This was done to prove that variables that were statistically significant in simpler regressions remained significant when all of the variables were included, making them statistically robust. Indeed, in this regression, all of the previously significant variables maintained significance. The coefficient for change in members remained relatively stable, decreasing slightly from -.10 to -.12. Again, this coefficient shows that every new justice shifts Supreme Court policy to a more conservative outcome by -.12 units.

The coefficient for the total number of changing justices' ideologies remained exactly the same at -.24. Thus, each additional justice changing his opinion in a case raises the degree of conservatism in Supreme Court precedent by .24 units.

The party of the president in power during the case also remained significant. In this regression, the coefficient for this variable is $-.57$, a slight decline from the $-.54$ generated by the previous regression. Here too, this signifies that when the party of the president changes from Republican (zero) to Democrat (one), precedent becomes more conservative by $.57$ units.

The coefficient for number of Republicans on the Court stayed the same at 1.20 . As before, this means that each additional Republican justice on the Court actually makes Supreme Court policy more liberal by 1.20 units.

The percentage of Republicans in the Senate remained statistically significant and yielded a coefficient of $.13$, a slight decrease from the $.10$ coefficient obtained in the previous regression. This means that each additional percentage point of Republicans in the Senate makes precedent more liberal by $.13$ units. Because there are 100 Senators, which makes each Senator exactly one percent of the Senate, this coefficient means that each additional Republican Senator shifts Supreme Court policy to a more liberal outcome by $.13$ units.

Finally, the value of R^2 in this regression is $.14$. This signifies that all of the independent variables, taken together, explain 14 percent of the variation in precedent.

The fourth regression that was run included only the small subset (62 total case votes) of the sample in which there were no changes in membership. This regression was run in order to examine the effects of ideological changes and public opinion on cases in which new members could not influence the case outcomes.

In this regression, the only statistically significant variable is percentage of Republicans in the Senate. The coefficient for this variable is $.29$, which means that each

additional percentage point of Republicans in the Senate raises the degree of liberalism in a Court precedent by .29 units.

The R^2 value in this regression is .29. This is highly significant as it shows that when there are no membership changes, 29 percent of all variation in Supreme Court policy can be explained by changes in Court ideology and public opinion.

The final regression that was run sought to examine the factors that are most likely to influence an individual Supreme Court justice to change his opinion. To that end, individual justice change in ideology served as the dependent variable, and was regressed on all of the independent variables.

In this regression, membership changes proved to be correlated with an individual justice's propensity to drift. The coefficient for membership changes is -.11, which indicates that each new justice on the Court makes an individual justice less likely to drift by .11 units.

Years of judicial experience and change in an individual justice's ideology are also correlated. The coefficient for this variable, -.04, indicates that each additional year of judicial experience makes a justice .04 units less likely to shift positions. This is likely a result of the fact that justices who have served on the judiciary prior to their Supreme Court appointments have been exposed to many of the issues that arise before the Court, and they are therefore more stable in their positions.

Not surprisingly, total Court change in ideology is statistically significant as well. The coefficient here is .06, which means that each additional justice who changes his opinion increases the likelihood that another justice will also change his position by .06

units. This fits well with the ideological drift theory, which holds that drifting justices are likely to influence other justices to change their own positions.

The results indicate that Supreme Court tenure is correlated with an individual justice's propensity to drift as well. The coefficient for this variable is .02, which means that each additional year a Supreme Court justice spends on the Court increases the likelihood that he will drift by .02 units.

Further, confirmation vote predicts an individual justice's propensity to drift. Interestingly, this regression yields a coefficient of .92 for confirmation vote, which means that each additional Senator that votes to confirm a justice increases the likelihood that a justice will drift by .92 units.

The value of R^2 in this regression is .47. This means that the factors discussed above explain 47 percent of variation in an individual justice's likelihood to change his opinion.

Regression Results					
	(1) Membership Change and Ideology Change Regression, With Precedent Change as the Dependent Variable	(2) Public Opinion Regression, With Precedent Change as the Dependent Variable	(3) Regression Including All Variables, With Precedent Change as the Dependent Variable	(4) Regression for Cases in Which There Were No New Members, With Precedent Change as the Dependent Variable	(5) Regression Including All Variables, With Individual Justice Change in Ideology as the Dependent Variable
Membership Differences	-.10** (.04)		-.12** (.04)	(Dropped)	-.11** (.01)
Judicial Experience	.00 (.03)		-.058* (.03)	-.06 (.08)	-.04** (.01)
Appellate Experience	-.00 (.03)		.00 (.03)	.00 (.06)	.01* (.01)
Total Court Change in Ideology	-.24** (.08)		-.24** (.08)	-.33* (.20)	.06** (.03)
Supreme Court Tenure	-.01 (.01)		-.03** (.01)	-.04* (.04)	.02** (.00)
Current President		-.54** (.22)	-.57** (.22)	-.09 (.70)	.09* (.08)
Appointing President		.13 (.23)	.25 * (.25)	.15 (.59)	-.15* (.09)
Confirmation Vote		.25 (.65)	1.10* (.83)	1.44 (1.9)	.92** (.28)
Number of Republicans on the Court		1.20** (.27)	1.20** (.27)	1.44* (1.14)	-.09* (.09)
Percentage of Republicans in House		(Dropped)	(Dropped)	(Dropped)	(Dropped)
Percentage of Republicans in Senate		.10** (.02)	.13** (.03)	.29** (.07)	.38 (.89)
Gender	.11 (.25)		-.13 (.26)	.22 (.58)	-.01 (.08)
Observations	302	293	293	62	293
R ²	.04	.08	.14	.29	.47

Figure 19: Summary of All Regressions Run

Note: * and ** indicate statistical significance at the 90 and 95 percent confidence intervals, respectively. Regression (1) contains independent variables measuring or predicting changes in membership and ideology only, and the dependent variable is change in precedent. Regression (2) contains independent variables measuring changes in public opinion only, and the dependent variable is change in precedent. It includes nine fewer observations because the confirmation vote variable, which is missing observations, is included in the regression. Regression (3) contains all independent variables, and the dependent variable is change in precedent. Regression (4) contains all independent variables, and the dependent variable is change in precedent, but includes only those cases in which there are no membership changes. The number of observations is thus significantly smaller than in the other regressions. Regression (5) contains all independent variables, and the dependent variable is individual justice's change in ideology.

SECTION VI: CONCLUSION

This study both disproved the hypothesis and called into question traditional research. The hypothesis, which maintained that variation in justices' ideologies is the primary factor responsible for influencing variation in precedent, was incorrect because the results showed that variations in membership, justices' ideologies, and public opinion all had significant effects on case outcomes. In fact, while there was only one statistically significant variable for both membership changes and ideological changes, there were four public opinion factors that were statistically significant in terms of their effects on shifting policy established by the Supreme Court. The sum of the public opinion variables' coefficients indicates that changes in public opinion actually exert *more* influence on changes in precedent than either membership or ideological variations.

Furthermore, the public opinion variables had some odd results. For example, the Supreme Court is more likely to shift policy to the right when there is a Democratic president in office. Nonetheless, this is likely the result of a Court backlash against a liberal presidency.

It is also important to analyze the results of the regression that was run for cases in which there were no changes in Court membership. This regression showed that only public opinion variables remain significant in the absence of new justices. Moreover, the R^2 value in this regression signified that 29 percent of variation in precedent is due to public opinion variables when there is no justice turnover. While this number may be somewhat inflated because the subset of cases in which there were no new members of the Court was much smaller than the total sample, it is still exceptionally high and speaks to the pressures that public opinion exerts on justices as they formulate their decisions.

In addition, it is clear that many of the variables discussed in the literature do in fact contribute to ideological drift. Surprisingly, new members on the Court actually decrease the likelihood that a given justice will drift. Nevertheless, when looking at the Rehnquist Court this finding makes sense as there was a twelve year period during which there was no Court turnover, but important ideological transformations among justices still occurred. Justice O'Connor serves as the classic example to illustrate this point, because she arrived at the Court a dedicated conservative who had been active in the Republican Party and, despite the lack of changes during a portion of Rehnquist's tenure as chief justice, she evolved into the moderate swing-vote responsible for shifting precedent.

Judicial experience, which was also discussed by the literature, proved to be important in influencing a justice's propensity to drift. As predicted by prior research, the more judicial experience a justice has, the less likely he is to change his opinions once he is on the Court. Further, total change in the Court's ideology is positively correlated with an individual justice's change in beliefs. This can mean that either multiple justices on the Court successfully convince an individual justice to shift his opinion, or that individual justices can sometimes effectively lobby other members of the Court to change their positions on an issue. In any event, it is clear that the effects of ideological drift are in fact augmented by simultaneous changes in ideology experienced by multiple justices. As the literature indicated, Supreme Court tenure also influences a justice's propensity to drift. The results here show that an individual justice is more likely to drift with each additional year he spends on the Court – which is exactly what the ideological drift theory predicts.

Additionally, in terms of public opinions influence on the probability that a justice will drift, it is interesting to note that the greater a justice's confirmation vote, the more likely he is to change his attitudes once he is on the bench. This may be a consequence of the fact that presidents often try to appoint moderate justices to avoid the confirmation battles that necessarily ensue upon the nomination of controversial justices. While these moderate candidates are the most likely to be confirmed by the Senate, they are also the most likely to drift once they are on the bench.

This is not to discount the impact of differences in the Court's membership. The effect of new justices on the Supreme Court was also found to be statistically significant in terms of effecting changes in policy and changes in individual justices' beliefs. However, the fact that the variable measuring total changes in the Court's ideology, and the public opinion variables representing the party of the president, the number of Republicans on the Court, and the Republican percentage of the Senate at the time of the case, were also significant highlights the flaws with traditional research that focuses solely on Court membership. Rather, the attitudinal and extralegal models may need to be merged in order to account for the complex series of factors that affect Supreme Court justices' voting behaviors.

In terms of problems with the study, there was in fact a minor methodological flaw. Although the sample constituted a full twenty percent of the population of First Amendment cases spanning a twenty-year period, perhaps a more copious sample might have yielded results that had a higher R^2 value. This problem can be addressed by future studies perhaps with the selection of a larger random sample, which will detract from the influence of possible outliers and add to the study's generalizability. Another way to

achieve this result would be to expand the universe of cases to include all civil liberties cases, which might better show the effects of new justices and changes in justices' original opinions on existing precedent.

An analysis of the generalizability of these results shows that the results are most generalizable to the entire population of First Amendment cases in the time period being studied. Further, it is relatively safe to conclude that the results are also generalizable to First Amendment cases heard by prior Courts, as the early and late and Rehnquist Court, examined in this study, were quite different from one another, and encompassed dramatic differences in voting behaviors. The early Rehnquist Court, for example, was somewhat left-leaning as, though it was headed by the conservative Chief Justice Rehnquist, it was composed of such extremely liberal members as Justices William Brennan, Thurgood Marshall, and the leftward-drifting Harry Blackmun. Conversely, the late Rehnquist Court was moderately conservative, albeit much more conservative relative to the early to middle Rehnquist Court. It was, in marked contrast, made up of such notoriously conservative members as Justices Antonin Scalia and Clarence Thomas. Because the transition from the early to the late Rehnquist Court was so drastic, it can reasonably be assumed that the precedent shifts in First Amendment cases that were heard by prior Courts, which probably fell somewhere in between the two extreme examples offered here, would have been influenced by membership and ideological changes to relatively the same degree as the cases studied here. By the same token, First Amendment cases heard by future Courts will also likely fall in between the early and late Rehnquist Courts in terms of the fact that the opinions of their members will be affected similarly by ideological changes and by variations in membership.

Although it might be logical to infer that changes in all precedents on all issues, and not merely those related to the First Amendment, might be influenced by the same factors in the same ways, it would not be methodologically sound for this study to conclude that changes in membership, ideology, and public opinion affect shifts in precedent in the same way that these factors effect First Amendment cases. It may be more plausible to generalize these results to the entire population of all civil liberties cases, but even this type of generalization, while more accurate than generalizing to the totality of the cases heard by the Supreme Court, may be somewhat inaccurate. In applying these results to civil liberties cases, the different manners in which votes can be cast – either a liberal vote to expand the freedom at issue or a conservative vote to constrain the freedom at issue – are the same as those votes that can be cast in First Amendment cases (an obviously fitting result as First Amendment rights *are themselves* a category of civil liberties cases). Thus, it is somewhat reasonable to conclude that the factors influencing these types of votes will affect all such civil liberties issues in similar, though perhaps not exactly the same, proportion.

Based on the results discussed here, it is important to analyze the implications of these findings for the current Court. This study's results showed that changes in membership, justices' ideologies, and public opinion all play a role in determining when justices choose to alter policies established by the Supreme Court. Thus, if the three factors are operating together they should have a stronger effect on precedent than they have independently of one another. The Roberts Court, still young, appears to be on a markedly more conservative trajectory than its predecessors. With two new members who have yet to experience the so-called ideological drift, which generally occurs gradually

over a justice's tenure on the bench, the current Court has revealed that it is not afraid to poke substantial holes in liberal precedent. Assuming that both Chief Justice Roberts and Justice Alito both become at least slightly more conservative, this will only push the Court closer to not simply corroding, but rather overturning, liberal holdings. Because "drifters" tend to influence one another, as well as other members of the Court, it is highly possible that Bush's appointments will push the already-right-leaning Justice Anthony Kennedy farther to the conservative side of the spectrum. Further, the upcoming presidential election may in fact seat another Republican in the White House. Perhaps with his two new appointments, and with the liberal eighty-seven-year-old Justice John Paul Stevens approaching retirement, President Bush will have accomplished the realignment of the Supreme Court that conservatives have sought for the past forty years.

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